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No.

In The
Supreme Court Of The United States
October Term, 1989

JOHN J. HARTER, Petitioner
v.
UNITED STATES OF AMERICA, et al., Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Alan Raywid
COLE, RAYWID & BRAVERMAN
1919 Pennsylvania Ave., N.W.
Suite 200
Washington, D.C. 20006
(202) 659-9750

Attorney for Petitioner

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QUESTIONS PRESENTED

The Department of State is mandated under the Foreign Service Act of 1980 to conduct promotion review through selection boards and to review errors in that process resulting in separation before the Foreign Service Grievance Board. To meet its burden of proving that an error by a selection board would not have influenced the result of denial of promotion, the Department has resorted to an administrative device of submitting this question to a "reconstituted selection board", established by the Personnel Office, whose conduct is the subject of the grievance. The Grievance Board in turn has accepted the conclusion of the reconstituted board as conclusive evidence of non-promotion. The questions presented are:

(1) Whether administratively created ad hoc reconstituted selection boards offend the statutory and regulatory schemes of promotion through selection boards and resolution of grievances before the Foreign Service Grievance Board.

(2) Whether the Department of State, in attempting to meet its burden to prove that despite errors in its promotion procedure a Foreign Service officer would not have been promoted, may defer to the decision of a "reconstituted selection board."

PARTIES TO THE PROCEEDINGS BELOW

The Petitioner was the Appellant in the United States Court of Appeals for the District of Columbia Circuit and Plaintiff in the United States District Court for the District of Columbia. The Appellees in the Court of Appeals and Defendants in the District Court were the United States of America and the Secretary of State, George P. Shultz.

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OPINIONS BELOW

The opinion of the court of appeals, reported at 871 F.2d 1140, is included in the Appendix. The unpublished opinions of the district court (No. 85-1086, dated January 31, 1986; No. 87-0711, dated November 11, 1987; and No. 87-0711, dated December 21, 1987) are also included in the Appendix. The decisions of the Foreign Service Grievance Board dated March 3, 1985 and January 1, 1987 are included in the Appendix. Other administrative decisions and court decisions are also contained in the Appendix.

JURISDICTION

The judgment of the Court of Appeals was entered on April 11, 1989. The orders denying rehearing and rehearing en banc were entered on July 12, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

The basis of subject matter jurisdiction in the district court is 22 U.S.C. §4140, which gives federal district courts jurisdiction over final actions of the Secretary of State or the Foreign Service Grievance Board under that Act.

STATUTORY AND REGULATORY PROVISIONS INVOLVED

The Foreign Service Act of 1980 provides that the promotion of Foreign Service officers be based upon recommendations and ranking by selection boards established by the Secretary of State. 22 U.S.C. §4001, et seq. The Act prescribes the composition of the selection boards and the criteria to be applied in ranking officers. Id. §§4002, 4003. Promotions must be in accordance with the rankings. Id. §4005. Those who fail promotion may be separated. Id. §4007. The Act also provides that those involuntarily separated may receive an evidentiary review of selection board error before the Foreign Service Grievance Board, id. 22 U.S.C. §4131(a)(1)(A), and the Board is empowered to correct selection board error by retaining

or promoting the aggrieved officer. Id. §4137(b). Regulations of the Department substantially track the statutory provisions, 22 C.F.R. §§901-10. Section 906 of the regulations guarantees to the grievant a hearing with a right to cross examine witnesses. 22 C.F.R. §906.8.

There is no statutory or regulatory authority for the procedure referred to as a "reconstituted selection board". That process, at issue here, is the creature of inter-office Department memorandum.

STATEMENT OF THE CASE

This case concerns the Department of State's improper substitution of a personnel procedure for promotion review provided by statute. The Foreign Service Act provides that promotion be initiated through independent selection boards, and where failure to achieve promotion may result in separation from the Foreign Service, an officer has a right to a hearing before the Foreign Service Grievance Board to challenge errors of the Selection Board. These two concomitant rights --promotion by independent selection board and review of promotion errors by the Foreign Service Grievance Board -- have been substantially undermined by the Grievance Board's deference to a reconstituted selection board in order to meet the Department's burden of proof that in the face of an established error by the Selection Board, the Department must demonstrate that the grievant would not have been promoted notwithstanding the error.

John Harter was a senior Foreign Service Officer with a 29 year record of service. On his last promotion review by a selection board, Harter's latest evaluation report was not forwarded to the Board. When the omission was discovered near the end of the Board's service, a garbled cable version was sent from his post in Geneva. The tardy cable report contained a falsely prejudicial statement of management skills by misstating a failure to utilize fully an employee who was not under Harter's supervision. The responsible personnel officer made two unauthorized appearances before the Selection Board to discuss Harter's record, thus flagging his consideration. When Harter received notice that he would not be promoted and would be separated from the service, he exercised his right to a hearing before the Grievance Board. The Grievance Board acknowledged the enumerated errors of the Selection Board, but nonetheless affirmed its conclusion denying promotion.

Harter appealed to the district court, which, although it found some of the errors of no consequence, also found as to the er-

ror of prejudicial information in the evaluation report, and that the Grievance Board had failed to apply the appropriate standard of proof, namely the Department must demonstrate that in the face of error, that the grievant would nevertheless not have been promoted. On remand to the Grievance Board, while Harter was awaiting pretrial agreement for presentation of further evidence, his adversary -- the Department's Personnel Office -- selected and convened a rump board, furnished it with selected personnel files of others promoted, along with a corrected Harter evaluation report, and asked it to determine whether on the basis of the information furnished, Harter would have been promoted.

Harter was not advised that this procedure was in progress, had no participation in the selection of this board, and had no knowledge of the information furnished to it. The finding of the rump board -- that Harter would not have been promoted -- was furnished in secret to the Department's grievance counsel, who then used the finding as his sole evidence in support of the Department's position that Harter in any case would not have been promoted. The Board overrode Harter's objection that deference to this unauthorized body was an improper delegation of the Grievance Board's statutory authority to adjudicate his grievance. Relying solely on the conclusion of the reconstituted selection board, the Grievance Board reaffirmed its prior decision of lack of consequential error. It rejected Harter's offer for a comparative analysis of those promoted to his own record. On review, the district court affirmed the Board's finding. The court of appeals affirmed on the ground that the finding of a reconstituted selection board could be used as the sole and conclusive evidence to meet the Department's substantial evidentiary burden that notwithstanding a demonstrated error, the grievant would not be promoted.[1]

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[1]The court of appeals erroneously observed that Petitioner filed numerous grievances during his "twenty year [actually 29 years] Foreign Service career, all of them substantially successful." Id. 1141. In fact Appellant has had only one grievance issue, the right to compete for promotion as guaranteed by the Foreign

REASONS FOR GRANTING THE WRIT

The court of appeals' decision is the first to legitimize the process of a reconstituted selection board and its use in grievance procedures. If undisturbed it will nullify hard won rights guaranteed by the Foreign Service Act of 1980 for both promotion by independent selection boards and grievances of promotion error before the Foreign Service Grievance Board. There is not likely to be a conflict in circuits because the Department of State is headquartered in Washington, D.C. and its selection boards and Grievance Board conduct their activities in that jurisdiction. The case is of exceptional importance because the decision offends the statutory scheme for promotion and grievances designed to achieve excellence in the Foreign Service Corps, while insuring fairness and independence of the promotion process. Further, it affects the basic rights of Foreign Service Officers to compete fairly for promotion and to insure through evidentiary review the integrity of that process. There are currently approximately 4600 Foreign Service officers, primarily responsible for the conduct of foreign affairs, all of whom are subject to these statutes and regulations. Of these, approximately 750 are of the rank of FS-1,[2] the same rank as Mr. Harter, and are most immediately affected because of the large number of involuntary retirements at that rank.

Service Act. Although Petitioner was successful in his first grievance, the two successive ones have essentially been to enforce the award of the first grievance panel.

[2]FS-1 is the highest career rank below the pool of senior Foreign Service Officers.

DEFERENCE TO A RECONSTITUTED SELECTION BOARD FOR RESOLUTION OF PROMOTION ERROR OFFENDS THE FOREIGN SERVICE ACT PROVISIONS FOR PROMOTIONAND GRIEVANCES

An agency must follow its statutory mandate for the conduct of its business.[3] This principle is particularly apt in the agency's conduct of personnel procedures.[4] Further, it is well established that in implementing its statutory mandate, while an agency may not be required to promulgate regulations, it is bound by those it has promulgated.[5] The Department of State's action in deferring to the reconstituted selection board offends both its statutory and regulatory scheme for promotion and grievance.

The Foreign Service Act of 1980 prescribes in detail the method of promotion in the Foreign Service through the establishment of and ranking by selection boards. 22 U.S.C. §4001 et seq. The boards are designed to insure that promotion is effected solely on the basis of comparative merit and not as a consequence of bureaucratic or political favoritism. Ibid. Promotions are based upon the recommendations and rankings of selection boards. 22 U.S.C. §4001(b). The Secretary establishes the selection boards and their membership must include public members and minority representation. 22 U.S.C. §4002. Recommendations and rankings are based upon records of character, ability, conduct, quality of work, indus-

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[3]No one in the Executive Branch may extend an otherwise legal procedure in excess of the authority granted by Congress for the purpose. Cole v. Young, 351 U.S. 536 at 543, 557-58 (1956).

[4]Congress may control the manner in which employees may be separated from government employment. Myers v. United States, 272 U.S. 52 (1926); United States v. Perkins, 116 U.S. 483 (1886).

[5]An agency's own regulations have the force and effect of law and are binding upon the agency that issues them. Accardi v. Shaughnessy, 347 U.S. 260, 267-68 (1954). Moreover, an agency may not effect an employee's discharge in violation of agency regulation. Service v. Dulles, 354 U.S. 363 (1957); Vitarelli v. Seaton, 359 U.S. 535 (1959).

try, experience, dependability, usefulness, and general performance. 22 U.S.C. §4003. Promotions made by the Secretary must be in accordance with the rankings of the selection boards. Id. §4005. Those who fail to be promoted may be separated from the service after remaining a maximum time in class. Id. §4007.

Because the Foreign Service is a highly competitive corps of specialized professionals and may result in early separation for those who do not progress, the Act has, through its grievance mechanism, insured that this process be scrupulously fair. At the same time, Congress recognized that errors can occur in the normal Selection Board process, especially as a consequence of defective performance ratings. Accordingly, it provided explicit procedures to ensure that the Foreign Service Grievance Board would have exclusive jurisdiction to review and correct any selection board error that might occur.[6] Specifically, the Act: (1) defines the term "grievance" as including involuntary retirement resulting from falsely prejudicial information in a performance rating, 22 U.S.C. §4131(a)(1)(A); (2)

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[6]Foreign Service grievance legislation is unique in government service. Although originally proposed in 1971, it was not enacted until 1980, in part because of strenuous opposition by the Department. In introducing the legislation, Senator Bayh explained: "The purpose of the legislation...is to bring about a significant change in the operation of State Department personnel policy...[s]incé...it has become increasingly evident that State Department employees have not been extended their full order of employee rights as guaranteed by Supreme Court decisions." U.S. Foreign Service Grievance and Appeals Procedure, 1971: Hearings on S.2023, S.2659 and 2662 Before The Comm. on Foreign Relations, 92d Cong., 1st Sess. 71 (1971)(S. Bayh). The published record of the hearings shows the opposition of the Department's personnel authorities to that legislation. Nevertheless, and despite their continuing opposition, the Congress included grievance procedures in the Foreign Service Act of 1980. See The Foreign Service Act of 1979, Hearings on S.1450, Before the Comm. on Foreign Relations, 96th Cong., 1st Sess. (1979). What the Department was unable to prevent in legislation, it has now defeated administratively through the device of the reconstituted selection board.

establishes the Foreign Service Grievance Board ("FSGB") to deal with grievances, 22 U.S.C. §4135; (3) empowered the FSGB "to retain in the Service" a Foreign Service Officer "whose separation would be in consequence of the matter by which he is aggrieved," 22 U.S.C. §4137(b)(3); and (4) endowed the FSGB with sufficient authority to promote Foreign Service Officers who present "meritorious grievances," 22 U.S.C. §4137(b)(2)(6). A matter properly before the Grievance Board shall constitute the exclusive remedy for the grievance. 22 U.S.C. §4139.[7]

Foreign Service Regulations precisely track the same statutory provisions, 22 C.F.R. §§905, 906. Furthermore, the FSGB Regulations provided for a mandatory hearing at the request of a grievant "in any case which involves...a grievant's retirement from the Service for expiration of time-in-class," 22 C.F.R. 906.2; and the Regulations guarantee the right to cross-examine at the hearing, 22 C.F.R. 906.8.

In marked contrast, the reconstituted selection board falls outside this statutory and regulatory scheme, and its use totally undermines the statutory structure. There is no authority in the Act or in any published regulations of the Department of State for the device referred to as a "reconstituted selection board". A reconstituted selection board is in conflict with the statutory promotion procedure through selection boards and review and correction of error by the Foreign Service Grievance Board.

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[7]In the case of involuntary separation, the Act empowers the Board to grant interim relief to a grievant by suspending his separation during the pendency of his grievance. 22 U.S.C. (4136(8). Even that relief was withheld from Harter on the preliminary finding that his grievance was frivolous and that he was not entitled to a hearing. The Board later acknowledged that Harter was entitled to a hearing, but after error had been established and the burden of proof shifted to the Government, the Board refused to reverse its conclusion on interim relief, thus substantially denying Petitioner the means to pursue his right to a hearing and subsequent review. Of course, the subsequent review established that the Board had applied the wrong legal standard as to burden of proof.

The reconstituted selection board is a creature of inter-office memorandum. It was structured as a device to meet the substantial burden recognized in Reiner v. United States, 686 F.2d 1017, 1021 (D.C. 1982) (Reiner II), citing Reiner v. United States, Civ. Action No. 78-0616, Slip Op. (D.D.C. April 30, 1979) (Reiner I). Although the initial burden is upon the grievant to show that the Department's failure was a substantial factor in the failure to be promoted, once established, the burden shifts to the Department to establish "by a preponderance of the evidence that, even in the absence of the Department's administrative error, [grievant] would not have been promoted." Ibid.[8] To meet this formidable burden the Personnel Office established that a reconstituted selection board, composed of members of similar composition as selection boards, would review the files of five officers immediately above the cut off line for promotion and rank them along with the grievant. After ranking, the reconstituted selection board was to determine if the grievant would have been promoted. This procedure was supposedly applied in the Harter case, although no knowledge of its existence, selection of its membership, or what records were placed before it, was ever made known during its deliberation. In its one-day meeting it concluded that Harter would not have been promoted. That naked conclusion, without substantiation or explanation, was then placed before the Foreign Service Grievance Board. The grievance board accepted this conclusion as meeting the Department's burden and reaffirmed its prior finding.

There is no authority in the Act or in any published regulations for the device the Department chose to call a "Reconstituted

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[8]It was on the basis of Reiner that the district court ruled that Harter had "carried his initial burden of showing that (certain comments in his 1983 performance rating) may have been a substantial factor in the failure to promote him..." The court therefore remanded the matter to the Grievance Board "with instructions to consider whether the Department has carried its burden of showing that Plaintiff would not have been promoted even in the absence of those critical comments..." (emphasis added) Slip. Op. at 7.

Selection Board," as used in this case. Furthermore, as shown above, the Grievance Board itself, just as it would have done in reviewing the conduct of the Selection Board, was obligated under the law and regulations to weigh any and all evidence that might have been relied upon by a reconstituted board, to produce a conclusion concerning promotion. The Foreign Service Grievance Board should not have deferred to a non-statutory body to assume its functions, and in doing so, it manifestly abdicated its statutory responsibility under 22 U.S.C. §4136.

Clearly the Grievance Board erred in adopting the conclusion of the reconstituted selection board as its own, given the fragility of that conclusion and its nature as hearsay, as well as Petitioner's timely objections to the procedure involved. The lower court and the court of appeals erred in sanctioning that procedure.[9]

The court of appeals' decision conflicts not only with its own rule in Reiner, 686 F.2d at 1021, but with Daniels v. Wick, 812 F.2d 729 (D.C.Cir. 1987), where the court held that the FSGB was

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[9]The court of appeals' decision accepts the Department's claim that their resort to the reconstituted selection board procedure was motivated by their desire to "replicate" the statutorily authorized Selection Board procedure. The reconstituted selection board process itself is inherently unfair. The members of the reconstituted board were selected by the Department itself -- without consultation with Petitioner -- through a process they did not divulge. The reconstituted board cannot possibly reconstruct the Selection Board process. It views only a handful of files, while the Selection Board views hundreds. In Harter's Selection Board there were 526 officers under review. The reconstituted board knows it is not performing an actual promotion, but convened only to support an earlier finding now under challenge. The grievant is frequently identified -- "red flagged" -- because of omissions in his file or by knowledge of the board members, and there is no means of testing this prior knowledge. While error can be identified before the Selection Board, the reconstituted board deliberation is impenetrable. The American Foreign Service Association is present at the briefings of the Selection Board, but its participation is barred at reconstituted selection board proceedings.

not empowered to make a decision relating to tenure in the Foreign Service because the Act explicitly specified that such decision should be made by the Tenure Board. Id. at 735-36. Here, Petitioner has shown that the Act envisaged that the FSGB itself should correct any errors emanating from the statutorily mandated Foreign Service promotion system and not redelegate its authority to a body essentially controlled by Respondents, who are themselves the adverse party in this litigation. [10]

The appeals decision is squarely at odds with the doctrine established in Accardi, that an agency must follow its own established regulations and procedures, rather than rely on a "non-statutory board composed of subordinates within a department headed by the individual who formulated, announced, and circulated such views of the pending proceeding." Accardi v. Shaughnessy, 347 U.S. 260, 267-68 (1954). Cf. also Service v. Dulles, 354 U.S. 363 (1956); United States of America v. Exxon Corporation, 470 F.Supp. 674 (D.C.Cir. 1979), aff'd 616 F.2d 526 (Em.Ct.App. 1980).

The reconstituted selection board's conclusion also fails as admissible evidence. It is in conflict with Section 906.8 of the Foreign Service Grievance Board Regulations, which guarantees a Foreign Service grievant facing involuntary retirement the right to cross-examine witnesses. 22 C.F.R. §906.2. Moreover, it is Black Letter Law that a report or investigation prepared in contemplation of litigation is not admissible evidence. Palmer v. Hoffman, 318 U.S. 109 (1943).

Finally, the conclusory statement of an unauthorized body violates the Federal Rules of Evidence. The Reconstituted Selection Board was hearsay, as defined by Rule 801(c) of the Federal Rules of Evidence, because it was not a statement "made by a declarant

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[10]See also Skinner v. United States, 594 F.2d 824, 830 (Ct.Cl. 1979): "The integrity and objectivity of the rating system go to the very heart of the military establishment's effectiveness, and all we do here is to preserve it as the statutes and authorized procedures contemplate and mandate."

while testifying at a proceeding offered in evidence to prove the truth of the matter asserted" and it did not fall within any of the "classes of statements [that are not hearsay] explicitly defined in the Federal Rules of Evidence."[11]

In resorting to a convenient administrative device to meet its formidable burden that its error did not affect promotion, the Department of State has departed from its statutory mandate, implemented by its own regulations of promotion by properly constituted selection boards, and review of promotion error by adjudication before the Foreign Service Grievance Board. In doing so, the Department is at odds with its statutory mandate. If uncorrected, this decision will substantially diminish the rights of Foreign Service Officers and undermine Congress' prescription for achieving competitive superiority in the Foreign Service Corps.

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[11]The court of appeals misapprehended the significance of the decisions of the Supreme Court in Vermont Yankee Nuclear Power Corporation v. Natural Resources Defense Council, 435 U.S. 519, 524 (1978) and F.C.C. v. Schreiber, 381 U.S. 279, 290-91 (1965) (both of which involve rulemaking rather than adjudicatory proceedings), as well as its own decision in Cities of Batavia, et al. v. F.E.R.C., 672 F.2d 64, 88 (D.C.Cir. 1982), inasmuch as Petitioner's contention here is not "founded on an impermissible view of the Board's procedural discretion in admitting evidence in grievance proceedings," but rather upon the view that the Foreign Service Grievance Board, when admitting such "evidence," must do so in accord with the standards of fairness which the Supreme Court has set out in past decisions. See also, Vitarelli v. Seaton, 359 U.S. 535, 540 (1958), "scrupulous observance of departmental procedural safeguards is clearly of particular importance". These safeguards were held to include the right to cross-examine. Id. at 544.

CONCLUSION

For the foregoing reasons, Petitioner prays that the Court grant his Petition for Writ of Certiorari.

Respectfully submitted,

Alan Raywid
COLE, RAYWID & BRAVERMAN
1919 Pennsylvania Ave. N.W.
Washington, D.C. 20006
(202) 659-9750
Counsel for Petitioner

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